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In the Supreme Court of the United States

OCTOBER TERM, 1975

BAYSIDE ENTERPRISES, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

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INDEX

Page

Opinions below 1
Jurisdiction 1
Question presented 1
Statutes involved 2
Statement 2
Argument 5
Conclusion 10

CITATIONS

Cases:

Abbott Farms, Inc. v. *National Labor Relations Board,* 487 F.2d 904 8

Bowie v. *Gonzalez,* 117 F.2d 11 6

Boyls v. *Wirtz,* 352 F.2d 63 6

Colchester Egg Farms, Inc., 214 NLRB No. 64 9

Elm Spring Farm v. *United States,* 127 F.2d 920 .. 7

Farmers Reservoir & Irrigation Co. v. *McComb,* 337 U.S. 755 6

McElrath Poultry Co., Inc. v. *National Labor Relations Board,* 494 F.2d 518 8

Mitchell v. *Hunt,* 263 F.2d 913 6

Mitchell v. *Huntsville Wholesale Nurseries, Inc.,* 267 F.2d 286 7

National Labor Relations Board v. *Gass,* 377 F.2d 438 6

Page

National Labor Relations Board v. *Olaa Sugar Company*, 242 F.2d 714 6

National Labor Relations Board v. *Strain Poultry Farms, Inc.*, 405 F.2d 1025 7-8

National Labor Relations Board v. *Victor Ryckebosch, Inc.*, 471 F.2d 20 8

Skidmore v. *Swift & Co.* 323 U.S. 134 7

Wirtz v. *Jackson & Perkins Co.*, 312 F.2d 48 7

Wirtz v. *Tyson's Poultry, Inc.*, 355 F.2d 255 ..... 8, 9

Statutes:

Fair Labor Standards Act, as amended (52 Stat. 1060, 29 U.S.C. 201, *et seq.*) 2
Section 3(f), 29 U.S.C. 203(f) 5-6

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) 2
Section 2(3), 29 U.S.C. 152(3) 5
Section 8(a)(1), 29 U.S.C. 158(a)(1) 5
Section 8(a)(5), 29 U.S.C. 158(a)(5) 5

60 Stat. 698 5
87 Stat. 763 5

Miscellaneous:

Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change* (1975) 9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is reported at 527 F. 2d 436. The Board's decision and order (Pet. App. A7-A22) are reported at 216 NLRB No. 92.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1975 (Pet. App. A6). The petition for a writ of certiorari was filed on March 8, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether truck drivers, who transport feed from their employer's mill to independent farms under contract with the employer to raise poultry hatched in his hatchery facilities, are employees, rather than agricultural laborers, and thus covered under the National Labor Relations Act.

STATUTES INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), and of the Fair Labor Standards Act, as amended (52 Stat. 1060, 29 U.S.C. 201, *et seq.*), are set forth at page 2 of the petition.

STATEMENT

1. Petitioner Bayside Enterprises, Inc., operates chick hatcheries and breeding farms in Belfast, Maine (Pet. App. A10; Tr. 34-37, 129-130).[1] Bayside has contracts with 119 independent growers or farmers in the area around Belfast for the care and feeding of the chickens from the age of one day until they are ready for processing for market (Pet. App. A11; Tr. 30-31). Petitioner Poultry Processing, Inc., a wholly owned subsidiary of Bayside, operates a mill at Thorndike, Maine, which supplies feed to the independent farms as well as to another poultry firm (Pet. App. A11-A12; Tr. 80-81, 84-85). Most of the poultry raised by the contract farms for Bayside is sold to Poultry Processing and processed for market at a plant owned by Poultry Processing (Pet. App. A12; Tr. 54-55, 190-191).[2] Although Bayside and Poultry Processing have separate employees, they have common officers and directors, a single corporate office, and a single controller

[1]"Tr." references are to the transcript of testimony before the Board, a copy of which has been lodged with the Clerk of this Court.

[2]Employees at this plant (which operates under the name of Penobscott Poultry Company), including crews who transport the live poultry from the contract farms to the plant, are jointly represented by Truck Drivers, Warehousemen, and Helpers of America Local 340, International Brotherhood of Teamsters, and Amalgamated Meat Cutters Local 385 (Tr. 54-55, 191).

(Pet. App. A13; Tr. 79, 88, 147-148, 152-153). They have common management and common control over labor relations (Pet. App. A13; Tr. 9-13, 40, 139-140).

Bayside furnishes feed, medicine and other supplies to the independent farmers and occasionally sends employees to the farms to observe the care given to the chickens and to determine if medical attention is needed (Pet. App. A11; Tr. 40-41). The contract between Bayside and the farmers ("growers") provides that "the Grower, his agents and employees shall not be considered to be employees of Bayside for any purpose whatsoever" (Pet. App. A28). The farmers provide the land, the facilities, and the labor for raising the poultry (Pet. App. A11; Tr. 78). A farmer's compensation for raising the poultry is ordinarily determined by the weight of the flock at maturity less the cost of the feed and materials supplied (Pet. App. A15, A23-A28; Tr. 101-105, 110-111, 125). Title to the chickens remains in Bayside until after they leave the farms for processing (Pet. App. A11-A12; Tr. 40).

Bayside employs 6 truck drivers to deliver feed from the mill at Thorndike to the independent contract growers who are situated, on the average, from 12 to 15 miles from the mill (Pet. App. A13; Tr. 53, 182). The drivers are supervised by a mill supervisor and dispatcher who makes up delivery schedules (Pet. App. A13-A14; Tr. 112, 135, 164-165, 174-179, 213-225).

The feed trucks are loaded and weighed at the mill, sometimes by the drivers and sometimes by the dispatcher (Pet. App. A14; Tr. 69, 177, 181-183, 199-200). In either case, the drivers are given slips telling them how much feed of a particular type to deliver to a given farm (Pet. App. A14; Tr. 176-177). The drivers then drive to the contract farms where they unload the feed into bins designated by the farmers (Pet. App. A14; Tr. 67,

200). The drivers' responsibilities include putting the proper amounts of feed into the designated bins, trying to keep rain out of the bins when unloading in bad weather, spraying their boots and trucks with disinfectant to avoid spreading poultry diseases, and driving their trucks carefully so as to avoid disturbing the chickens by loud noises and bright reflections from headlights (Pet. App. A14-A15; Tr. 67-68, 74).

The drivers have no direct contact with the poultry (Pet. App. A15; Tr. 112). Less than half of the drivers' time is spent at the farms; the remainder is spent at the feed mill and in driving (Pet. App. A14-A15; Tr. 166-167). The drivers deliver feed to three or four farms a day (Pet. App. A15; Tr. 64), spending from half an hour to an hour at each farm (Tr. 201). They drive approximately 100 to 120 miles each day (Tr. 224).[3]

In October 1973, the Union[4] requested recognition as the representative of Bayside's drivers who deliver feed from the Thorndike mill to the contract farms (Pet. App. A11). Bayside recognized the Union and began contract negotiations (Pet. App. A11; Tr. 11). However, after several sessions, Bayside broke off bargaining negotiations on the ground that the drivers were agricultural employees and hence not covered by the Act (Pet. App. A11; Tr. 13, 16).

2. Upon charges filed by the Union, the Board found that Bayside and Poultry Processing constituted a single

[3]In addition to making deliveries to the contract farms, the drivers have also on occasion delivered feed from another feed mill to breeder farms owned by Bayside, and have transported feed ingredients from Rockland, Maine, and Gloucester, Massachusetts, to the feed mill at Thorndike (Pet. App. A15-A16; Tr. 112-114).

[4]Local 340 of the Teamsters, one of the representatives of the processing plant employees (n. 2, *supra*).

employer ("Bayside") for purposes of the National Labor Relations Act (NLRA). The Board further found that, while Bayside's own breeding farms and hatcheries may constitute branches of farming, the feed mill and feed delivery operations were not farming, and that the feed truck drivers' duties were incidental to the operation of the feed mill and not to Bayside's farming operations. (Pet. App. A18-A19.) Accordingly, the Board concluded that the drivers were not "agricultural laborers" but rather "employees" within the meaning of Section 2(3) of the NLRA, that they constituted an appropriate unit for bargaining, and that Bayside thus violated Section 8(a)(5) and (1) of the NLRA when it refused to bargain with the Union for that unit (A20). The Board entered a bargaining order (Pet. App. A21-A22, A7-A8).

3. The court of appeals enforced the Board's order (Pet. App. A1-A5). The court upheld the Board's finding that Bayside and Poultry Processing were a single employer, "a multi-faceted organization whose enterprises and purposes go beyond the bounds of farming" (Pet. App. A4). The court also held that Bayside was not a farmer "for that portion of its business which supports the raising of poultry on contract farms" and that thus the feed mill drivers were not employed "incidental to or in conjunction with" Bayside's own farming operations (Pet. App. A5). Consequently, they were not exempt from the NLRA as agricultural laborers (*ibid.*).

ARGUMENT

1. Section 2(3) of the NLRA excludes from the definition of employee "any individual employed as an agricultural laborer." Since 1946, riders to the Board's appropriation acts (*e.g.*, 60 Stat. 698; 87 Stat. 763) have regularly provided that the term "agricultural laborer" shall be defined in accordance with Section 3(f) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203(f), which reads:

> "Agriculture" includes farming in all its branches and * * * includes * * * the raising of * * * poultry, and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations * * * .

This Court has held that the FLSA definition has two distinct parts. The first relates to actual farming operations, and the second "includes any practices whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidently to or in conjunction with 'such' farming operations." *Farmers Reservoir & Irrigation Co.* v. *McComb,* 337 U.S. 755, 763. The activities included in the second portion of the definition, however, must actually be performed on a farm, and be incidental to the farming operations of that farm. *Id.* at 766, n. 15; *Bowie* v. *Gonzalez,* 117 F.2d 11, 18 (C.A. 1); *Mitchell* v. *Hunt,* 263 F.2d 913 (C.A. 5). See also *National Labor Relations Board* v. *Olaa Sugar Company,* 242 F.2d 714, 718 (C.A. 9); cf. *Boyls* v. *Wirtz,* 352 F.2d 63 (C.A. 5).

The court of appeals correctly applied these principles in rejecting petitioners' contention that the feed mill drivers came within the second part of the definition because they were performing services incidental to Bayside's farming operations.[5] As the court stated (Pet. App. A4-A5):

> The bulk of the capital and personnel of Bayside is devoted to the feed mill and the processing plant operations which are concededly not farming. The company does operate chick hatcheries and breeding farms which do constitute farming under the applicable statutes. 29 C.F.R. §780.125(b) (1974). In the remaining segment of the business, the raising of

[5]The court followed its earlier decision in *National Labor Relations Board* v. *Gass,* 377 F.2d 438 (C.A. 1).

> chickens to maturity, the actual farming activity is done by the contract farmers. According to current Department of Labor regulations, retention of title to the poultry pending maturity on contract farms does not entitle a business to be classified as a farmer. 29 C.F.R. §780.126 (1974).[4] Nor does Bayside's delivery of feed, however crucial to the development of poultry on the contract farms it may be, justify classifying Bayside as a farmer. Rather, the Bayside feed delivery system is part of a separate organization, supportive of agricultural activity, but not directly engaged in farming. See 29 C.F.R. §780.126 (1974) * * * .

[4]"Feed dealers and processors sometimes enter into contractual arrangements with farmers under which the latter agree to raise to marketable size baby chicks supplied by the former who also undertake to furnish all the required feed and possibly additional items. Typically, the feed dealer or processor retains title to the chickens until they are sold. Under such an arrangement . . . [t]he activities of the feed dealer or processor . . . are not 'raising of poultry' and employees engaged in them cannot be considered agricultural employees on that ground . . . ."

The court properly relied on the Department of Labor regulations; since the regulations were promulgated by the agency in charge of enforcing the FLSA, they are entitled to great weight. *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 139-140. Moreover, the regulations are consistent with analogous case law involving similar contractual arrangements for growing or processing an employer's product. See *Mitchell* v. *Huntsville Wholesale Nurseries, Inc.,* 267 F. 2d 286 (C.A. 5); *Wirtz* v. *Jackson & Perkins Co.,* 312 F. 2d 48, 51 (C.A. 2); *Elm Spring Farm* v. *United States,* 127 F. 2d 920 (C.A. 1).

2. While we believe it is correct, the decision of the court below is in conflict with decisions of other courts of appeals. Thus, in *National Labor Relations Board* v.

Strain Poultry Farms, Inc., 405 F. 2d 1025, the Fifth Circuit held that, in a poultry raising operation similar to that here, the agricultural exemption applied to the employer's (Strain's) truck drivers, who hauled chickens to market from farmers under contract with Strain to grow them to maturity. In the court's view (*id.* at 1032), "[t]he fact that Strain hired the independent growers to raise its birds and contract loaders to catch the birds for loading onto its trucks would not seem to destroy its claim to having raised the poultry." The Ninth Circuit, following *Strain*, reached the same conclusion in a substantially identical situation. *National Labor Relations Board* v. *Victor Ryckebosch, Inc.*, 471 F. 2d 20. Moreover, in *Abbott Farms, Inc.* v. *National Labor Relations Board*, 487 F. 2d 904, and *McElrath Poultry Co., Inc.* v. *National Labor Relations Board*, 494 F. 2d 518, the Fifth Circuit extended *Strain* to exempt from the NLRA feed mill employees and employees who transport feed to and from the employer's mill. See also *Wirtz* v. *Tyson's Poultry, Inc.*, 355 F. 2d 255 (C.A. 8).

The court below purported to distinguish *Strain* and *Abbott* on the ground that the employers there were primarily engaged in traditional agriculture and, unlike petitioners, owned no processing plant to slaughter and dress the poultry (Pet. App. A5). We submit, however, that the underlying rationale for the court's decision is directly at odds with that of *Strain* and *Abbott*, as well as of the other contrary decisions which the court did not specifically attempt to distinguish.[6] The analysis of the court below rests on the premise that Bayside's farming

[6]The court below did indicate that it found the contrary decisions unpersuasive (Pet. App. A3).

operations are limited to its hatcheries, which are separate from its feed mill operations, and that the independent farmers who are under contract to raise Bayside's poultry to maturity are engaged in their own farming. Thus services furnished by Bayside's feed mill drivers are incidental to its feed mill operations, rather than to any farming operations. The other courts have rejected this basic premise.

3. The question presented is a recurring one in the administration of the NLRA. Thus, in *Colchester Egg Farms, Inc.*, 214 NLRB No. 64, the Board reaffirmed its position in the instant case, and has filed an application for enforcement in the Second Circuit (No. 76-4052).[7] As petitioners note (Pet. 9), there are serious practical objections to having a conflict in the circuits on this issue.[8] Moreover, resolution of the issue would have a direct impact on cases arising under the FLSA (see *Wirtz* v. *Tysons Poultry, supra*), as well as on those arising under other statutes which refer to agricultural laborers or employees (see Pet. 11, n. 13).

[7]The Board has requested the Second Circuit to hold the proceeding in abeyance until this Court rules on the instant petition.

[8]For example, petitioners' earlier attempt to have the instant case reviewed in the Fifth Circuit (see 514 F. 2d 475 (C.A. 1), 515 F. 2d 503 (C.A. 5)) demonstrates that the conflict among the circuits furnishes a strong inducement for forum shopping.

The Commission on Revision of the Federal Court Appellate System has identified the question presented here as one that has too long escaped authoritative resolution. *Structure and Internal Procedures: Recommendations for Change* (1975), A152-A153.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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